

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

_____)	
In the Matter of)	
)	
Empowering Consumers to Prevent and Detect)	CG Docket No. 11-116
Billing for Unauthorized Charges (“Cramming”))	
)	
Consumer Information and Disclosure)	CG Docket No. 09-158
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170
_____)	

COMMENTS OF METROPCS COMMUNICATIONS, INC.

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MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its comments on the rules proposed in the *Notice of Proposed Rulemaking* (“*NPRM*”), released July 12, 2011, by the Federal Communications Commission (the “FCC” or “Commission”) in the above-captioned proceeding.² While MetroPCS supports the goals of the *NPRM*, MetroPCS believes competition, rather than regulation, is the appropriate way to meet these goals, particularly when the authority of the Commission to promulgate the proposed rules is subject to serious challenge. In support of its views, the following is respectfully shown:

¹ For purposes of these Comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC license holding subsidiaries.

² *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges* (“Cramming”); *Consumer Information Disclosure*; *Truth-in-Billing and Billing Format*, Notice of Proposed Rulemaking, CG Docket No. 11-116; CG Docket No. 09-158; CC Docket No. 98-170, FCC 11-106 (filed Jul. 12, 2011) (the “*NPRM*”).

I. INTRODUCTION AND SUMMARY

On July 11, 2011, President Barack Obama issued an Executive Order entitled “Regulation and Independent Regulatory Agencies”³ which obligates independent federal regulatory agencies, including the Commission, “to take new steps to ensure smart, cost-effective regulations designed to promote economic growth and job creation.”⁴ The action was intended to strengthen the commitment of government agencies to the “cost-saving, burden-reducing principles” set forth in the President’s January 18, 2011 Executive Order entitled “Improving Regulation and Regulatory Review.”⁵ That earlier order called on federal agencies, *inter alia*, to use the “least burdensome tools for achieving regulatory ends,” by conducting both quantitative and qualitative cost/benefit analyses. The Commission’s efforts to protect consumers from cramming must be pursued with these laudable regulatory objectives in mind. At a time of economic stagnation and serious unemployment, the Commission must be careful not to adopt well-intentioned regulations that would divert capital from job-creating endeavors to less productive compliance activities. Further, the Commission must consider whether there are other ways, such as competition, that may obviate or reduce the need for regulation.

MetroPCS understands the Commission’s concern with regard to cramming, and commends the Commission for further considering ways to detect and prevent unauthorized and fraudulent charges on telephone bills.⁶ The challenge for the Commission is to find an approach

³ Exec. Order No. 13579, 76 FR 41587 (Jul. 14, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf>.

⁴ Posting of Cass Sunstein to the White House Blog, <http://www.whitehouse.gov/blog/2011/07/11/president-s-executive-order-improving-and-streamlining-regulation-independent-regula> (July 11, 2011, 6:28 PM EDT).

⁵ Exec. Order 13563, 76 FR 3821 (Jan. 21, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

⁶ *NPRM* ¶ 1.

which will protect consumers without shackling carriers – particularly small and mid-tier wireless carriers – with burdensome obligations that will prove to do more harm than good. Further, the Commission must consider that competition already acts to incent carriers to prevent consumers from unwanted charges.

With this goal in mind MetroPCS submits that the proposed wireline regulations should not be applied to wireless services which often utilize unique billing platforms and industry practices that cannot comply with the proposed regulations. For example, certain wireless service providers, such as prepaid and pay-in-advance service providers, do not provide hard-copy bills to their customers, and requiring them to do so would increase costs for both the provider and consumer. The retail wireless market is extremely competitive which provides a strong incentive for carriers to safeguard their customers, and keep them satisfied with their service. Competition encourages carriers to innovate and create new forms of protection for their customers without Commission intervention.

Recently, the FCC and CTIA announced a compromise designed to tackle consumer bill shock through voluntary industry-led efforts, in lieu of government intervention. The Commission should follow a similar approach with cramming and allow industry-led efforts to protect consumers in the first instance.

Any adopted cramming regulations must not hinder the wireless industry's transformation into an innovative credit platform. Wireless services are evolving into a transaction platform where the wireless device itself is a form of charging instrument. The proposed regulations present barriers to this transformation as providers will then be regulated by two different sources of regulation – those governing open-ended debit cards, and those

governing telecommunications companies. Once again, costs will increase as conflicting efforts may be required to comply with the two sets of regulations.

MetroPCS also is concerned that the FCC lacks the authority to regulate charges for non-telecommunications services that may appear on a consumers' bill. The *NPRM* fails to establish the jurisdictional authority for the Commission to regulate these non-telecommunications charges. The *NPRM* also fails to provide a showing that the proposed regulations – which regulate commercial speech – will directly advance the Commission's goals, which gives rise to First Amendment concerns.

Finally, if the Commission does implement cramming requirements, MetroPCS submits that small, rural and mid-tier carriers should be exempt from complying with these rules. Initially, the Commission should only impose such rules on the nationwide wireless carriers, while small, rural and mid-tier wireless carriers are provided flexibility to offer similar, or better tools designed to assist consumers in detecting and preventing cramming.

II. THE PROPOSED WIRELINE REGULATIONS SHOULD NOT BE APPLIED TO WIRELESS SERVICES DUE TO THE DIFFERENT NATURE OF WIRELESS BILLING PLATFORMS AND INDUSTRY PRACTICES

MetroPCS applauds the Commission for recognizing that wireless services are fundamentally different in important respects from wireline service, and seeking comment in the *NPRM* on whether the proposed cramming requirements for wireline carriers should be applied to wireless and CMRS providers as well.⁷ MetroPCS also is glad that both the FCC and the FTC recognize that the vast majority of cramming-related consumer complaints are coming with respect to wireline services:

⁷ *NPRM* ¶ 53.

[T]he majority of the cramming complaints filed with the Commission and the FTC relate to wireline rather than wireless – 82 percent of Commission cramming complaints from 2008 to 2010, and 90 percent of FTC cramming complaints in 2010.⁸

Since the scope of the cramming problem is dramatically different, there is no basis for the Commission to adopt a “one-size-fits-all” approach, particularly in light of the directive, which the Commission has endorsed, to avoid unnecessary regulations.⁹

The *NPRM* also focuses on the fact that wireline customers seem to believe that they have to pay any and all charges on their wireline bill – even if the charges are from third parties. This behavior is not mirrored in the behavior customers exhibit with respect to wireless bills.¹⁰ Because wireless has not evolved in the same manner as the highly regulated wireline utility service, consumer perception is different.¹¹ Wireless consumers know that they have multiple choices for carriers. They scrutinize bills closely and do not hesitate to change carriers if they experience recurring bill shock.¹²

Wireless providers also offer a greater variety of services and rate plans ranging from pure metered usage post-paid plans to pay-in-advance, flat-rate, all-you-can-eat service plans with a seemingly infinite number of bucket combinations in between. These variances give rise

⁸ *Id.* ¶ 53.

⁹ This difference is not surprising given that wireless services are considerably more competitive than wireline services. Indeed, over 90% of the population has a choice of four or more wireless carriers. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Fifteenth Report, WT Docket No. 10-133 ¶ 44 (rel. June 27, 2011) (“*Fifteenth Report*”).

¹⁰ This behavior is no doubt a result of the fact that wireline services were considered a utility service, whereas wireless services have not historically been considered utility services.

¹¹ For example, the wireless industry offers various service models, many of which do not provide bills to customers.

¹² This is especially true for customers of prepaid and pay-in-advance carriers that do not require customers to enter into a long-term contract.

to dramatically different billing policies and formats. For example, MetroPCS offers its customers a simple electronic notification when payment is due, not a hard copy bill. It would be unfortunate if the Commission reduced consumers' ability to subscribe to MetroPCS' services by subjecting MetroPCS' efficient and simple billing process for these services to additional regulatory requirements. Commission interference through the imposition of the proposed wireline regulations would disrupt such streamlined practices, create barriers to continued innovation in this industry, and may increase the cost of providing the service, which could limit the availability of important services to underserved populations.¹³

a. Certain wireless services do not provide bills to their customers and should not be required to comply with the proposed regulations

MetroPCS is concerned that the proposals offered in the *NPRM* do not address how prepaid and pay-in-advance service providers can comply – or if they are required to comply – with the proposed rules. Specifically, the proposed rules would require carriers to “(1) notify subscribers clearly and conspicuously, at the point of sale, *on each bill*, and on their websites, of the option to block third-party charges from their telephone bills, if the carrier offers that option; and (2) place charges from non-carrier third-parties *in a bill section* separate from carrier charges.”¹⁴ Likewise, the proposed rules also will require carriers to “*include on all telephone bills* and on their websites the Commission’s contact information” for complaint submission.¹⁵

These regulations appear to presuppose that customers receive actual hard-copy bills from their

¹³ One of the reasons MetroPCS is able to offer its services at low prices is that it avoids costs borne by many other carriers, such as producing paper bills, which may be substantial.

¹⁴ *NPRM* ¶ 3 (emphasis added). Since MetroPCS is a pay-in-advance carrier, MetroPCS currently requires customers to have funds available to purchase additional services. Customers have the option of not putting funds in their account, which means they would never have charges for their MetroPCS services.

¹⁵ *Id.* ¶ 3 (emphasis added).

carriers. Since MetroPCS and other prepaid carriers do not ordinarily supply such bills to their customers, it is unclear how these rules would apply in this context.¹⁶ The Commission should clarify that the new rules do not apply to prepaid or pay-in-advance services.

Since MetroPCS does not regularly issue hard-copy bills, it is naturally wary of any rules that might require MetroPCS to issue such bills, or to bill customers in a particular format. One core aspect of the MetroPCS service philosophy is to craft simple, understandable rate plans that allow consumers to avoid unpleasant “bill shock” surprises. MetroPCS customers generally like the fact that, instead of getting a telephone bill containing pages and pages of detail, they get a simple reminder that they owe a fixed amount – the same amount as last month – on a certain date. In essence, a FCC rule requiring MetroPCS to modify its simple billing process with a raft of anti-cramming disclosures, would interfere negatively with the MetroPCS customer experience. And, requiring all wireless bills to contain the same boilerplate information would undermine an element of the MetroPCS competitive service offering – simple streamlined billing reminders – that has enabled MetroPCS to distinguish itself from others. Further, requiring bills would increase MetroPCS’ costs, which could in turn make its services less competitive.

MetroPCS submits that business practices – particularly for small and mid-sized wireless carriers who lack market power – should follow consumer demand and market direction, not regulation. MetroPCS and others who offer similar “all-you-can-eat” pay-in-advance, flat-rated plans, do not regularly generate paper bills, and therefore will have difficulty implementing these rules and may be forced to change the way that they conduct their business. This is readily

¹⁶ This issue, however, should not impose further requirements on such carriers forcing them to provide bills to customers. MetroPCS has experienced that even if it does offer on-line bill presentment, the majority of customers choose not to exercise this option. Indeed, the proposed cramming rules do not require carriers to provide bills to their customers, and the Commission should not use this opportunity to change that. *See NPRM* ¶ 3.

apparent with the proposed requirement that third-party charges are to be placed in sections separate from charges assessed by carriers and their affiliates on bills.¹⁷ This, among the other additional bill presentment rules proposed in the *NPRM*,¹⁸ will require significant changes to existing billing systems, and therefore increase costs for providers – costs that will ultimately be borne by consumers.¹⁹ The cost of implementing these rules far outweighs any potential benefits, as the problem being solved by these proposed cramming rules is disproportionately small when compared with the cost that would be incurred to address it. In addition, there has been no showing that having third-party charges placed in separate sections will make it any less likely that cramming occurs.²⁰ In fact, the FCC has not yet provided a cost-benefit analysis showing that the proposed rules are an appropriately-targeted response to the problem. Such a study should be initiated and published before such a costly requirement is imposed.²¹

Many of these prepaid services, including MetroPCS' services, are designed with the low-income consumer in mind. Increasing costs for carriers will result in higher prices for consumers. These low-income consumers need wireless services, including broadband, the

¹⁷ *Id.* ¶ 45.

¹⁸ *Id.* ¶ 48 (proposing highlighting charges on the first page of the bill as well as requiring identification of the third-party vendors in a different manner than other biller identification, among other proposals).

¹⁹ The Commission recognizes that these changes to existing billing formats may force carriers to incur extra costs and necessitate an implementation period. *Id.* ¶ 49.

²⁰ Indeed, the Commission merely believes that this requirement will reduce consumer confusion and deception. *Id.* ¶ 46. Without empirical data, this requirement would fail in the face of reasoned decision-making.

²¹ See Memorandum from the Executive Office of the President: Office of Management and Budget to The Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies (Feb. 2, 2011) <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf> (noting that the FCC, as an independent agency, is not required to conduct a cost-benefit analysis, but is certainly encouraged to consider undertaking such an analysis); see also Exec. Order No. 13563, *supra* note 5.

most, as they disproportionately rely on wireless services for all or most of their telecommunications and broadband needs.²² By increasing the costs paid by consumers for wireless service, the Commission will be erecting more barriers to, rather than facilitating, the adoption of mobile wireless broadband. The Commission should act in accordance with the goals of the National Broadband Plan and encourage these services, rather than impose unnecessary regulations.²³

b. Market cooperation, not regulation, is the best solution to prevent cramming

Due to the unique nature of wireless billing platforms, such as the prevalence of prepaid services, the Commission should allow voluntary industry efforts, rather than its own regulation, to lead the way on consumer protection efforts against cramming. The recently announced CTIA-FCC compromise on bill shock is a prime example of how consumer protection measures are best implemented. In an effort to crack down on sudden and unexpected increases in wireless customers' monthly bills, CTIA worked with the Consumers Union and the wireless industry to "empower[] consumers with the tools and information they need to navigate the rapidly changing technology landscape."²⁴ The Commission appropriately recognized that, due to this promising nature of industry-led efforts to protect consumers, it should put its rulemaking

²² See Henry M. Rivera, *How Wireless Policy Affects Minorities*, POLITICO, May 26, 2011, <http://www.politico.com/news/stories/0511/55695.html> (stating that "Latinos and African-Americans lead the way in mobile broadband use – subscribing at a rate of 53 percent and 58 percent, respectively, and both groups will be disproportionately affected if providers fail to keep up with the demand. . . .").

²³ FCC, *CONNECTING AMERICA: A NATIONAL BROADBAND PLAN FOR OUR FUTURE* (2010).

²⁴ Julius Genachowski, Chairman, Fed. Comm'n Comm'n, Address at The Brookings Institute (Oct. 17, 2011).

on hold, and take a “trust, but verify” approach to the bill shock issue.²⁵ This is the same approach that the Commission should be taking to tackle yet another billing problem: cramming. While the *NPRM* questions “whether current industry practices or voluntary industry guidelines can address any cramming issues successfully,”²⁶ the simple fact is it would be premature to abandon voluntary industry practices in the wireless arena. As earlier noted, the data indicates that the main problems are arising in the wireline context.²⁷ Indeed, the *NPRM* expressly notes that some of the voluntary CTIA guidelines “do not appear to address the specific practices that are the subject of all the rules proposed. . . .”²⁸ Rather than evidencing a need for Commission action, this finding clearly indicates that the Commission cannot yet conclude that voluntary industry- driven policies in the current area of concern have failed or will fail. Wireless carriers have implemented safeguards, and will continue to create innovative new protections for customers due to the competitive nature of the industry. Just as the Commission trusted the industry to lead efforts to protect consumers from bill shock, it should rely on the same approach here, and allow the industry to work with consumers and consumer groups to create a voluntary market-based solution. As MetroPCS has long advocated, competition and innovation, not regulation, is the answer.

²⁵ *Id.* An important aspect of these rules is that the national carriers agreed to follow them. The Commission should focus on the national carriers in any approach and let competitive forces, rather than regulation, cause small, rural and mid-tier carriers to meet consumers’ needs.

²⁶ *NPRM* ¶ 39.

²⁷ Another differentiating aspect of wireless is that wireless typically bundles its services offerings together – such as telecommunications and Internet access – services which are usually separately billed by wireline providers.

²⁸ *NPRM* ¶ 54.

c. The competitive wireless market causes carriers to safeguard their customers

The *NPRM* proposes rules “designed to assist consumers in detecting and preventing the placement of unauthorized charges on their telephone bills.”²⁹ In determining whether these rules should be applied to wireless carriers, the Commission should also consider the role that the competitive retail wireless market plays. Wireless competition creates powerful incentives for carriers to cater to the needs of consumers, and to keep them adequately informed about service usage and overage charges. According to the Commission’s recent report on wireless service, “approximately 277 million people, or 97.2 percent of the population, are covered by at least three mobile voice providers [while] [a]pproximately 269 million people, or 94.3 percent of the population, are covered by at least four mobile voice providers.”³⁰ This competition is the result of wise Commission policies that have historically relied on competition rather than regulation to ensure wireless carriers meet consumers’ needs. As a result, consumers have a wide variety of choices when they select a wireless carrier, and carriers must work hard to distinguish themselves from their competitors by offering consumers exactly what they want. This requires the wireless carrier to provide service at a competitive price and empowers consumers to manage their wireless experience by “voting with their feet” and changing carriers if they aren’t satisfied. This is especially true with respect to prepaid and pay-in-advance services that require no long-term contract, such as those offered by MetroPCS. In this highly competitive retail environment, MetroPCS, and all the wireless carriers want to provide their customers with the best, most hassle-free option. This strong incentive to meet consumer demand is what drives innovation and ensures that consumers are protected in this industry.

²⁹ *Id.* ¶ 1

³⁰ *Fifteenth Report* ¶ 44.

The wireless market, still in its nascency, is constantly innovating and evolving to meet changing consumer demands and better meet the needs of its customers. Carriers are constantly improving their offerings and fine-tuning their business models to fit the expectations of their target audiences. At this point, Commission mandates regulating the carrier/customer relationship will potentially stifle the natural development and transformation of this industry and make it harder for small, rural and mid-tier carriers to compete. For example, the *NPRM* proposes that carriers be required to provide information on whether they offer blocking options for third-party charges.³¹ Competition will ensure that carriers provide appropriate safeguards on their own – without the Commission’s mandates. There is no need to have the FCC dictate what a blocking program should look like, nor is there a need for the Commission to mandate whether carriers can charge for blocking. Simply put, the Commission should not be in the business of dictating business models or practices to carriers. MetroPCS opposes such regulations, as unique blocking options may be used as a competitive advantage in the retail market. FCC intervention in this area will only diminish the competitive value of this option, and interfere with market forces.

Furthermore, some carriers, including MetroPCS, provide their customers with a “bill reminder message” which includes any amounts owed, but does not contain any details about the charges.³² This practice was implemented by MetroPCS as a safeguard, and is yet another example of market forces creating tools that help protect American consumers from unexpectedly high bills. This safeguard was designed without Commission intervention, and

³¹ *NPRM* ¶¶ 59 – 61.

³² MetroPCS’ customers have the option of requesting an on-line bill, or at the point of payment may also inquire what charges are included. For most consumers, the monthly bill for MetroPCS is the same (since many of MetroPCS’ plans include all applicable taxes and regulatory fees) and thus, customers can easily ascertain whether charges have been added to their bill.

represents an important consumer oriented service that further demonstrates the type of innovation which results from the competitive, demand-driven wireless marketplace.³³ The retail wireless market is governed by market incentives that ultimately protect consumers. As the market continues to develop and evolve with these demand-driven consumer protections, intervention by the Commission is not warranted at this time.

III. ANY ADOPTED CRAMMING REGULATIONS MUST NOT HINDER THE NATURAL EVOLUTION OF THE WIRELESS INDUSTRY

a. Treating wireless bills differently than credit or debit card bills will stifle the industry's transformation into a credit platform

Prepaid wireless services are an increasingly popular option for consumers, and prepaid services continue to increase their overall penetration in the wireless service market.³⁴ Not only are small, rural and mid-tier providers offering prepaid services, but there has also been an “aggressive push by the nationwide network operators into the prepaid segment . . . [which] pressure[s] traditional regional prepaid providers such as Leap and MetroPCS to lower their prices,” and also implement new unique forms of prepaid service.³⁵

MetroPCS, for example, currently offers MetroConnect, a supplementary usage-based, pay-in-advance service that allows the customer to deposit money into an account that can later be drawn against to receive and pay for certain supplemental services not included in the

³³ The practice of providing customers with a “bill reminder message” merely acts as a reminder, and should not be interpreted as sending a bill for the purposes of these proposed rules. Therefore MetroPCS requests that the Commission confirm that such practices, as employed by MetroPCS and other carriers, do not qualify for regulation under this proposal.

³⁴ “[T]he number of prepaid subscribers grew 17 percent during 2009, with the unlimited prepaid segment growing 58 percent [t]he increase in unlimited prepaid subscribership levels may reflect the decreasing prices of unlimited prepaid plans . . . as well as the economic downturn.” *Fifteenth Report* ¶ 166.

³⁵ *Id.* ¶ 100.

customer's basic service plan.³⁶ Such services may include music, ringtones, ringback tones, apps, and games. As the consumer uses the usage-based services, agreed-upon amounts are withdrawn from the account. The customer never ends up paying more than the predetermined amount they personally decided to fund into the MetroConnect account. Further, customers who want to avoid third-party charges entirely can simply not place money in their MetroConnect account. In effect, MetroConnect is designed to meet Commission goals under this *NPRM* to ensure that customers are not surprised at the end of the month from unexpected charges, which highlights one of the many great advantages of using a prepaid wireless service.

Allowing customers to use their prepaid and pay-in-advance wireless accounts to pay for third-party goods and services in this manner is an important next step in the wireless revolution. Prepaid and pay-in-advance wireless services are evolving into a transaction platform where the wireless device itself is a form of charging instrument. This is a positive pro-consumer development that should not be stifled in its nascency by overly broad Commission regulations that will discourage experimentation and creativity. If – and when – this transition to “handset-as-credit-card” occurs, wireless carriers are going to be bound by two different sources of regulation – those governing open-ended debit cards, and those governing the carrier is defined as a telecommunications company. Attempting to comply with these regulations will be time-consuming and costly for wireless providers if there are major differences between the two regulations.³⁷ For example, credit and debit card companies are not required to provide detailed

³⁶ Each MetroPCS customer automatically receives a MetroConnect account upon activation of service. See www.metropcs.com/metroconnect/

³⁷ This problem will be further compounded if the Commission imposes even more regulations on wireless carriers that over-lays with financed regulations.

contact information for transactions listed on billing statements that are sent to customers.³⁸

Long-standing credit card company billing policies are based on the reasonable assumption that consumers are aware what particular charges are for and where their cards are used and if the customer wishes to dispute a charge, they are aware that they must do so in a timely manner before their next bill. Consumers are familiar with the practice of disputing questionable charges if need-be, without additional detailed information listed on the bill. Further, customers using a prepaid, fixed-value debit card (*e.g.*, a Starbucks card) do not even receive a periodic list of charges that can be disputed, since it is presumed that the customer has possession of the debit card and has adequate purchase information at the point of purchase. There simply is no reason that the use of a wireless phone as a prepaid charging instrument should be treated any differently. Just as credit card companies may hold their customer responsible for verifying their purchases, wireless companies should be allowed to do so as well. Credit and debit card companies also are not required to “verify” or “otherwise qualify” billing parties, and there is no reason that wireless companies should be laden with this extra burden, either.³⁹

The Commission also should not act to dissuade the expansion of debit service to underserved populations. For many of MetroPCS’ customers, the MetroConnect account is their first foray into debit services. Some are unbanked or have been credit-challenged, which means that a pre-funded wireless payment system provides a valuable consumer service. The Commission should encourage the growth of these services – not hamper them by imposing unnecessary regulations. By moving forward with these regulations, the Commission will effect the unintended consequence of limiting financial services to credit-challenged populations.

³⁸ Credit card statements merely provide “a brief identification . . . sufficient to enable the obligor either to identify the transaction or to relate it to copies of sales vouchers or similar instruments previously furnished. . . .” 15 U.S.C. § 1637(b)(2); *cf. NPRM* ¶ 55.

³⁹ *See NPRM* ¶ 58.

IV. THE FCC DOES NOT HAVE THE AUTHORITY TO REGULATE CHARGES FOR NON-TELECOMMUNICATIONS SERVICES

MetroPCS disputes the authority of the FCC to regulate in this area to the extent the charges that are the subject of the rules are for non-telecommunications services. The Commission wisely has indicated that it is not proposing to regulate the billing services function.⁴⁰ However, the *NPRM* does risk having the Commission overstep its authority by seeking to regulate aspects of service that are not for telecommunications services. The Commission relies upon Section 201(b) of the Act, and takes comfort in the fact that its jurisdiction under that section extends to “[a]ll charges, practices, classifications, and regulations for *and in connection* with such communications service.”⁴¹ But, the *NPRM* utterly fails to establish that regulating disclosures for third-party services – some of which may be non-communications-service-related – falls within this authority. Regulating this whole playing field will exceed this Commission authority. Therefore, before any rules are implemented, the Commission must establish its procedure for determining how it will regulate charges over which it lacks subject matter jurisdiction.

V. THE PROPOSED REGULATIONS HAVE NOT BEEN SHOWN TO DIRECTLY ADVANCE THE COMMISSION’S GOALS AND ARE LIKELY TO RAISE FIRST AMENDMENT ISSUES

Moreover, any proposed requirements forcing carriers to provide a particular type of billing statement raises First Amendment concerns, as the Commission would be effectively mandating speech from the carriers to their customers. The Commission properly recognizes that the *NPRM*’s proposed requirements constitute the regulation of commercial speech and must

⁴⁰ *Id.* ¶ 82.

⁴¹ 47 U.S.C. § 201(b) (emphasis added).

meet the *Central Hudson* framework to be found compatible with the First Amendment.⁴² As a result, the burden is on the FCC to establish that: “(1) there is a substantial government interest [involved]; (2) the regulation directly advances the substantial government interest; and (3) the proposed regulation is not more extensive than necessary to serve that interest.”⁴³ Although the Commission may have a colorable basis to argue that “protecting consumers from unjust or unreasonable charges and practices” constitutes a substantial government interest, the test does not end there.⁴⁴ In order to demonstrate that a regulation directly advances the government’s substantial interest, the Commission must “demonstrate the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”⁴⁵ Despite stating that the “proposed regulations are designed to advance the government’s interest by providing consumers with basic tools necessary to protect themselves from these authorized charges,” the Commission has not met its burden.⁴⁶ There is no record evidence indicating that the harm – particularly in the wireless arena – is substantial and thus “real,” or that the proposed “tools” are necessary to substantially alleviate the cramming problem.

The final prong of *Central Hudson* also is not satisfied. In the context of commercial speech, while the government need not employ the least restrictive means to accomplish its goals, “it must utilize a means that is ‘narrowly tailored’ to its desired objective.”⁴⁷ The

⁴² *NPRM* ¶ 86; *Central Hudson Gas & Elec. Corp. v. Pub. Servs. Comm’n*, 447 U.S. 557, 566 (1980).

⁴³ *NPRM* ¶ 86 (citing *Central Hudson*, 447 U.S. at 566).

⁴⁴ *Id.* ¶ 87 (stating that the Commission’s statutory obligations include such protection); *See* 47 U.S.C. § 201(b).

⁴⁵ *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

⁴⁶ *NPRM* ¶ 87.

⁴⁷ *Bd. of Tr. of the State Univ. of NY v. Fox*, 442 U.S. 469, 480 (1989); *see also Fl. Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995).

proposed requirements are certainly not a “narrowly tailored” approach to reaching the Commission’s goals of assisting consumers in detecting and preventing the placement of unauthorized charges on their telephone bills.⁴⁸ For example, one possible, more-tailored alternative would be to exempt from such cramming requirements any carrier that already exhibits its own safeguards for consumers. Alternatively, the Commission could elect only to apply the proposed regulations to the larger nationwide carriers, as they dominate approximately 90% of the market.⁴⁹ The Commission should also exempt prepaid and pay-in-advance carriers as another means of tailoring the regulations to only these relationships which competition may not remedy. By doing so, market forces would encourage the smaller, rural and mid-tier carriers to develop their own, less costly, means to maintain their customer base in such a competitive environment.

VI. IF THE COMMISSION DOES IMPLEMENT CRAMMING REQUIREMENTS, SMALL, RURAL AND MID-TIER CARRIERS SHOULD BE EXEMPT

If the Commission decides nonetheless to go forward with implementing cramming requirements as proposed in the *NPRM*, it should only impose them on the dominant wireless carriers.⁵⁰ Once the cramming requirements are mandated for the top dominant four wireless carriers, the competitive market will ensure that the small, rural and mid-tier carriers continue to meet their consumer needs as well. This approach will accord the non-dominant carriers more flexibility to offer similar, or better tools designed to assist consumers in detecting and preventing the placement of unauthorized charges on their bills. This approach also will save small, rural and mid-tier carriers from the costs of compliance that have a disproportionate effect

⁴⁸ *NPRM* ¶ 1.

⁴⁹ See discussion *infra* section VI.

⁵⁰ AT&T Inc., Verizon Wireless, Sprint Nextel, and T-Mobile nationwide service providers cover in excess of 87.5 percent of the U.S. population. *Fifteenth Report* ¶ 27.

on them. For example, as the Commission has correctly acknowledged, modifying billing systems can be costly. Large carriers can spread these costs, which have a large, fixed, per-system component, over a larger number of customers. Exempting non-nationwide carriers also will allow the Commission to assess whether these rules are truly required for the wireless industry, and may possibly provide support needed for the imposition of such rules in the future.⁵¹

VII. CONCLUSION

MetroPCS opposes any application of the proposed wireline cramming regulations to wireless services, especially to prepaid and pay-in-advance services which are offered without the requirement of a long-term contract. Wireless services operate differently than wireline services in many respects, but most notably – through billing platforms and industry practices. Many wireless carriers, unlike wireline providers, do not provide detailed hard-copy bills to their customers because they offer prepaid or pay-in-advance services, and it would be disruptive to require such carriers to comply with these billing regulations. Therefore, in order to protect consumers, the Commission should take the same approach it has used with bill shock – rely upon industry standards implemented through market forces, rather than government regulation. Since the wireless market boasts a highly competitive environment, this will ensure that proper safeguards are secured to protect customers from further cramming problems on their bills. The Commission also must recognize the natural ongoing evolution of the wireless industry as an alternative wireless payment platform, and, ensure that any rules do not act as a barrier to this transformation.

⁵¹ For example, if there is a trend of customers leaving the smaller carriers that do not provide these rules, to join a dominant carrier that must abide by these rules, then the Commission will have the proper support needed to further determine the necessity of these rules.

Also, before any rules are implemented, the Commission must carve out from the regulations, charges over which it lacks subject matter jurisdiction and fully address the serious First Amendment issues that are raised due to the Commission's inability to satisfy the *Central Hudson* test. Finally, if the proposed requirements are adopted, MetroPCS recommends a limited implementation of these rules to the dominant carriers, with an exemption for the small and mid-tier carriers.

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